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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1225

ROADWAY EXPRESS, INC.,

Appellant,

vs.

DIRECTOR, DIVISION OF TAXATION,

Appellee.

Motion to Dismiss and/or Affirm

Pursuant to Rule 16(1)(b) and 16(1)(d) of this Court, the Attorney General of the State of New Jersey, on behalf of the State of New Jersey, and the Director of the New Jersey Division of Taxation, moves to dismiss this appeal and/or affirm the judgment below on the grounds that the questions presented are so unsubstantial as not to require further argument.

Opinions Below

The opinion of the New Jersey Supreme Court is officially reported at 50 N. J. 471, 236 A. 2d 577 (1967). The opinion and the judgment of the Court are included in the

Jurisdictional Statement as Appendix A and Appendix B, respectively. The opinion of the New Jersey Division of Tax Appeals, dated December 20, 1965, is set forth in the Jurisdictional Statement, at Appendix C.

Question Presented

Does the Commerce Clause of the Federal Constitution prohibit a fairly apportioned, non-discriminatory State tax, statutorily directed to the ownership and employment of property or the maintenance of an office in the taxing State, and in lieu of other local taxes which may be imposed on intangible personal property, from being levied upon a foreign corporation doing an interstate business in the taxing State.

Statement of the Case

A. Proceedings Below.

This litigation arose on Petition of Appeal to the New Jersey Division of Tax Appeals for review of a 1962 determination by the Director of the New Jersey Division of Taxation imposing corporate business taxes for the years 1946 to 1960 inclusive pursuant to N.J.S.A. 54:10A-1 *et seq.* Appellant resisted the assessment, contending that it was solely engaged in interstate commerce and that application of the taxing statute to it was proscribed by the Commerce Clause of the United States Constitution. The matter was submitted to the Division of Tax Appeals upon an agreed stipulation of facts. The taxpayer did not contend that the tax was discriminatory against interstate business or that it was an undue burden on interstate commerce. It did not assert that the New Jersey tax was unapportioned. It did not attack the amount of the taxes determined to be due by the Respondent.

On December 20, 1965, the Division of Tax Appeals, in a written decision, upheld the validity of the assessment. The appellant thereupon duly filed an appeal to the Appellate Division of the Superior Court of New Jersey. While pending unheard in the Appellate Division, the Supreme Court of New Jersey certified the controversy for its immediate review.

B. The Decision of the New Jersey Supreme Court.

On December 18, 1967, the Supreme Court affirmed the decision of the Division of Tax Appeals and upheld the assessments in question. In the course of its written opinion, the Court analyzed both the nature of the New Jersey Corporation Business Tax and its constitutional applicability to appellant.

The Supreme Court ascertained that the tax imposed by N.J.S.A. 54:10A-1, *et seq.* is an impost upon any one or a combination of a number of different privileges, the exercise of which involve a substantial relationship between the taxpayer and the State of New Jersey. After carefully considering and analyzing this Court's most recent decisions upholding, as constitutionally permissible, an apportioned and non-discriminatory tax on interstate business, the New Jersey Court also concluded that the New Jersey tax as applied to the portion of the appellant's interstate business localized in New Jersey was fully within the ambit of this constitutional authority.

A Notice of Appeal to the United States Supreme Court was filed by appellant in the New Jersey Supreme Court on February 19, 1968.

ARGUMENT

POINT I

The Judgment of the New Jersey Supreme Court comports with established constitutional principles.

A. The United States Supreme Court by amalgamating a series of decisions after *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951) developed a rule of constitutional propriety based upon the right of a state to tax interstate corporations as a means of establishing a *quid pro quo* for the protection and services afforded the enmeshed local incidents of corporate activity.

***1. The movement away from the formalism of Spector Motor Service* v. *O'Connor*.**

This Court in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951) passed upon the constitutional validity of a taxing statute of the State of Connecticut which imposed a tax, measured by allocated net income, on the franchise of domestic and foreign corporations solely for the privilege of carrying on business in the State.

The taxpayer in *Spector* conducted an exclusively interstate trucking business in Connecticut. The Connecticut tax was non-discriminatory as to interstate commerce; was not in lieu of an *ad valorem* property tax (at p. 607) and did not rest upon the use of highways by motor trucks (at p. 606). It was demarcated:

> "'. . . a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign'." (at p. 606).

It was made clear in this Court's opinion that in considering constitutional propriety

> "The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State." (at pp. 608-609).

Acting within the statutory import of the Connecticut law the imposition of the privilege tax was declared invalid.

In a progression of cases following *Spector* this Court answered a series of attacks on taxing statutes which sought to enlarge the constitutional ambit of that decision.

Initially, two cases, read in tandem, are significantly illustrative of the judicial development. *Railway Express Agency* v. *Virginia*, 347 U. S. 359 (1954) (*Railway Express I*) and *Railway Express Agency Inc.* v. *Virginia*, 358 U. S. 434 (1959) (*Railway Express II*) demonstrate the progression of approach over a five year span.

In *Railway Express I*, the Court struck down a Virginia tax statute applying only to express companies. Virginia's statute provided:

> ". . . that 'for the privilege of doing business in this State,' express companies shall pay 'in addition to . . . the property tax as herein provided' an 'annual license tax' upon gross receipts earned in the State 'on business passing through, into or out of this State.'" (at p. 362).

The taxpayer was a foreign corporation which under Virginia law could not exercise intrastate public service powers. Thus, the taxpayer was engaged solely in interstate business in Virginia.

The tax in dispute did not depend upon the ownership of any physical property, nor upon the value thereof, but was levied on gross receipts alone. This Court noted that:

> "The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated." (at p. 367).

In holding the Virginia tax invalid the reach of this Court's ruling in *Spector* was delineated.

> "It is enough to say that we recently have ruled [citing *Spector*] that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax." (at p. 368).

Thereafter, Virginia amended its taxing law to provide in pertinent part that:

> "'[e]ach express company . . . shall . . . pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.'
>
> The franchise tax is measured by 'the gross receipts derived from operations within' Virginia which is deemed
>
> 'to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of ex-

press transported through, into, or out of this State.'" (*Railway Express II Railway* at p. 438).

Once again the Virginia law compelled consideration of the taxpayer as engaged solely in interstate business.

This time, in *Railway Express Agency* v. *Virginia*, 358 U. S. 434 (1959), the Virginia tax was sustained as applied to the taxpayer. While not mentioning *Spector* directly in connection with the substantive features of the tax, this Court did say that the:

> ". . . sole question under the Commerce Clause is whether the tax in practical operation is on property or on privilege." (at p. 439).

As noted by the Supreme Court of New Jersey, the two Railway Express cases

> ". . . demonstrate that while a state, under a literal view of the *Spector* thesis, may not impose a tax upon interstate commerce solely for the privilege of doing that business in a state, a franchise tax may be imposed thereupon if the incidence or basis is a privilege other than engaging in that business as such or when the levy is in lieu of other state taxes which could be validly imposed on exclusively interstate business." (Ab19a).

On the same day this Court rendered its decision in *Railway Express II*, it handed down its opinion in *Northwestern States Portland Cement Company* v. *Minnesota*, 358 U. S. 450 (1959). Two cases had been consolidated for decision. The first, *Northwestern Cement* concerned an annual tax of the State of Minnesota upon the taxable net income of

> ". . . 'domestic and foreign corporations . . . whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both.'" (at p. 453).

The second case, *Williams* v. *Stockham Valves and Fittings, Inc.* dealt with a tax of the State of Georgia levied upon net income

> ". . . 'received by every corporation, foreign or domestic, owning property or doing business in this State.' The Act defines the latter as including 'any activities or transactions' carried on within the State 'for the purpose of financial profit or gain' regardless of its connection with interstate commerce." (at pp. 456-457).

* * *

> "In neither of these cases was the taxpayer a domiciliary of the taxing State, incorporated or with its principal place of business there, though each carried on substantial local activities." (at p. 459).

Both the tax of Minnesota and the tax of Georgia were sustained.

The judicial authority to pursue this form of tax was given notwithstanding the long established

> ". . . doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States." (at p. 458).

This doctrine was exemplified in part by a reading of *Spector* to the effect that

> ". . . a State may not lay a tax on the 'privilege' of engaging in interstate commerce. . . ." (at p. 458).

In categorizing and distinguishing the *Spector* hypothesis this Court said:

> "Any doubt as to the validity of our position here was entirely dispelled four years after *Beeler*, in a unanimous *per curiam* in *West Publishing Co.* v. *McColgan*, 328 U. S. 823, citing the four cases of *Beeler*, *U. S. Glue Co.*, both *supra*, *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245 (1928) and *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945)." (at p. 460).

Plaintiff, in the *West Publishing Co.* case, it was stated:

> "' . . . overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce, and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause.' " (at p. 461).

Northwestern Cement enunciates the shift from the rigid formalism of *Spector* into a practical working approach to the constitutional propriety of state taxation of interstate commerce. This movement is expressed by the statement of this Court that:

> "The taxes are not regulations in any sense of that term. Admittedly they do not discriminate against nor subject either corporation to an undue burden. While it is true that a State may not erect a wall around its borders preventing commerce an entry,

> it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State. The levies are not privilege taxes based on the right to carry on business in the taxing State. The States are left to collect only throught ordinary means. The tax, therefore, is 'not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce'." (at pp. 461-462).

Answering the specific contention that a contrary result was dictated by the decision in *Spector* it was noted that there

> ". . . it was repeatedly emphasized that the tax was 'imposed upon the franchise of a foreign corporation for the privilege of doing business within the State . . . .' Thus, it was invalid under a long line of predecents, some of which we have mentioned. It was not a levy on net income but an excise or tax placed on the franchise of a foreign corporation engaged 'exclusively' in interstate operations. * * * In *Spector* the incidence was the privilege of doing business, and that avenue of approach had long been declared unavailable under the Commerce Clause. As was said in *Spector*, 'taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and [are] non-discriminatory'.
>
> * * *

> [T]he 'controlling question is whether the state has given anything for which it can ask return.' Since by the practical operation of [the] tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred . . .' it 'is free to pursue its own fiscal policies, unembarrassed by the Constitution . . .'." (at pp. 463, 464, 465)

General Motors Corp. v. *Washington*, 377 U. S. 436 (1964) decided the constitutional validity of a tax by the State of Washington imposed upon a foreign corporation's privilege of engaging in business activities within the State.

> "The tax is measured by the appellant's gross wholesale sales of motor vehicles, parts and accessories delivered in the State. Appellant claims that the tax is levied on unapportioned gross receipts from such sales and is therefore, a tax on the privilege of engaging in interstate commerce . . . ." (at pp. 437-438)

The Supreme Court of Washington upheld the tax on the ground that it bore a reasonable relationship to appellant's activities within the State. This court affirmed, concluding the tax was levied upon the incidents of a substantial local business in Washington and was constitutionally valid.

Once again there was enunciated the narrow operational sphere of *Spector*.

> "As was said in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 609 (1951), '[t]he State is not precluded from imposing taxes upon other activities or aspects of this [interstate] business which, unlike the privilege of doing interstate business, are subject to the soverign power of the State.' This is

> exactly what Washington seeks to do here and we cannot say that appellant has shown that its activities within the State are not such incidents as the State can reach.
>
> • • •
>
> Thus, in the bundle of corporate activity, which is the test here, we see General Motors' activity so enmeshed in local connections that it voluntarily paid taxes on various of its operations but insists that it was not liable on others. Since General Motors elected to enter the State in this fashion, we cannot say that the Supreme Court of Washington erred in holding that these local incidents were sufficient to form the basis for the levy of a tax that would not run contrary to the Constitution." (at pp. 447, 448)

There is an obvious significance in the progression from *Spector* through *General Motors*. *Spector* continues to mandate against a state tax levied upon the privilege or right to carry on an interstate business in the taxing state. It does not, however, under the clearly enunciated policies of this Court, preclude the imposition of

> ". . . a fairly apportioned, non-discriminatory means of requiring such a corporation to pay its just share of the cost of state government upon which it necessarily relies and by which it is furnished protection and benefit." (Ab23a)

2. The broad ambit of permissible State taxation.

The declared limitations of *Spector* should not be permitted to overshadow the scope and breadth of State tax levies on interstate corporations sustained as constitutional by this Court. In support of the holding that interstate business must pay its own way, there have been approved property taxes

". . . on the instruments employed in commerce, Western Union Telegraph Co. v. Attorney General, 125 US 530, 31 L ed 790, 8 S Ct 961 (1888); on property devoted to interstate transportation fairly apportioned to its use within the State, Pullman's Palace Car Co. v. Pennsylvania, 141 US 18, 35 L ed 613, 11 S Ct 876 (1891); on profits derived from foreign or interstate commerce by way of a net income tax, William E. Peck & Co. v. Lowe, 247 US 165, 62 L ed 1049, 38 S Ct 432 (1918), and United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L ed 1135, 38 S Ct 499 (1918); by franchise taxes, measured by the net income of a commercially domiciled corporation from interstate commerce attributable to business done in the State and fairly apportioned, Underwood Typewriter Co. v. Chamberlain, 254 US 113, 65 L ed 165, 41 S Ct 45 (1920); by a franchise tax measured on a proportional formula on profits of a unitary business manufacturing and selling ale, 'the process of manufacturing resulting in no profits until it ends in sales,' Bass, Ratcliff & Gretton, Ltd., v. State Tax Comm'n, 266 US 271, 282, 69 L ed 282, 287, 45 S Ct 82 (1924); by a personal property tax by a domiciliary State on a fleet of airplanes whose home port was in the taxing State, despite the fact that personal property taxes were paid on part of the fleet in other States, Northwest Airlines, Inc., v. Minnesota, 322 US 292, 88 L ed 1283, 64 S Ct 950, 153 ALR 245 (1944); by a net income tax on revenues derived from interstate commerce where fairly apportioned to business activities within the State, Northwestern States Portland Cement Co. v. Minnesota, 358 US 450, 3 L ed 2d 421, 79 S Ct 357, 67 ALR 2d 1292 (1959); and by a franchise tax levied on an express company, in lieu of taxes upon intangi-

> bles or rolling stock, measured by gross receipts, fairly apoprtioned, and derived from transportation within the State, Railway Express Agency, Inc. v. Virginia, 358 US 434, 3 L ed 2d 450, 79 S Ct 411 (1959)." *General Motors, supra* at pp. 439, 440.

To this list must be added an unapportioned gross receipts tax the levy of which

> ". . . is so closely related to the local activities of the corporation as to form 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " Id. at p. 448.

It is within this pattern of functionally permissible taxation that the Supreme Court of New Jersey has spoken in sustaining the New Jersey tax levied on appellant.

B. The decision of the Supreme Court of New Jersey follows the already developed pattern of judicial precedent.

1. The New Jersey tax is levied on a multiform basis and relates in its functional incidence to local corporate activity.

For the purpose of determining constitutional applicability the Supreme Court of New Jersey carefully examined the true nature of the New Jersey Corporation Franchise Tax and the detailed facts relating to the properties and activities of appellant within the State of New Jersey.

> "The basis of the tax is a broad one and is not, as the taxpayers contend, imposed merely or solely for the privilege of doing business in New Jersey. It is a state tax applying generally to all domestic and foreign corporations, except those exempted by N.J.S.A. 54:10A-3—primarily financial institutions

and certain public utilities taxed specially by other acts. It was certainly intended to reach foreign corporations doing an intrastate business, an interstate business, or both, as far as could constitutionally be done, and its disjunctive recital of the various privileges must be considered with the intended overall coverage in mind. It was enacted in 1945 (L. 1945, c. 162), before *Spector* (and not amended since as far as the basis of the tax is concerned) and during the period when the approach of the United States Supreme Court may be said to have been that of the so-called multiple taxation doctrine. * * * The privileges taxed, N.J.S.A. 54:10A-2, are stated, as we have indicated, in the alternative and are not confined, as was the Connecticut statute in *Spector,* to that 'of carrying on or doing business within the state'. (340 *U. S.*, at *p.* 603, *n.* 1, 71 *S. Ct.* 509, 95 *L. Ed.* 576). Thus the privilege taxed may also be either that of exercising its corporate franchise within the state, *or* of owning or employing capital or property in the state, *or* of maintaining an office in the state. The last two stated alternatives clearly point particularly to the nexus of local activity within the state of a nature and extent, as here, where it can realistically be said that state government substantially affords protection and gives benefits to the corporation's enterprise within the state.

"Perhaps even more significant is the express 'in lieu' feature of the tax—'And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act.'' N.J.S.A. 54:10A-2. (50 N. J. 471, 483, Ab12a-13a)

It concluded, upon the stated basis of the tax, that

> ". . . viewed in the light of our statutory provisions, we conclude that it is correct to say that the New Jersey corporate business tax, by reason of the alternative bases set forth in the act, is not imposed upon foreign corporations merely or solely for the privilege of doing interstate business in New Jersey. We think also there is no longer necessarily any conclusive magic in the denomination of a tax as a 'franchise' tax or by another label. We believe validity will now be judged, broadly speaking and in the absence of Congressional action, on whether it is a fairly apportioned, non-discriminatory means of requiring such a corporation to pay its just share of the cost of state government upon which it necessarily relies and by which it is furnished protection and benefit. We are of the opinion that the New Jersey tax meets that test as applied to the taxpayers here involved." (Id. at pp. 491, 492, Ab22a-23a).

* * *

> "More technicaly speaking, it is our view that the New Jersey tax is validly applicable to these taxpayers on the foundation of other bases expressed in the statute. The first is that the tax is expressly in lieu of 'all other State, county or local taxation upon or measured by intangible personal property' of a foreign corporation, which kind of a tax we conceive could be validly imposed on a corporate entity of another state conducting an exclusively interstate business here. We believe the tax is additionally sustainable as a levy 'for the privilege of . . . employing or owning capital or property, or maintaining an office, in this State', if not also 'for the privilege of . . . exercising its corporation franchise' here. N.J.

> S.A. 54:10A-2. We think such privileges are sufficiently different from that of 'doing' interstate business so that they are, in the sense stated in *Spector*, aspects of such business subject to the sovereign power of the state." (Id. at p. 492, Ab23a-24a).

The Court gave full effect to the constitutional significance of *Spector* garnered from an examination of the progression of decisions from *Spector* through *General Motors*.

2. *The constitutional restrictions of Spector are applicable to that aspect of the tax levied solely upon the privilege of carrying on an interstate business in New Jersey.*

The judgment opinion of the New Jersey Supreme Court fully accepted the constitutional prohibitions of *Spector* as interpreted by the United States Supreme Court.

> "It remains established that a tax on an exclusively interstate business verbally based solely on the privilege of doing such business in the state is constitutionally forbidden. * * * Since a state may not exclude such a corporation from doing such business within it, it may not exact an impose on the thesis of a condition of entry therein." (Id. at p. 492, Ab23a).

Accordingly, the Court construed

> ". . . that basis of New Jersey's tax to be inapplicable to taxpayers like those involved here." (Id. at p. 492, Ab23a).

In so doing the Court has continued the viability of *Spector* to the extent prescribed and limited by this Court.

3. *Appellant's corporate activity in New Jersey provides substantive support for the imposition of the New Jersey Franchise Tax.*

The activities of appellant within New Jersey came under careful scrutiny. Focusing upon them, it is quite clear that its interstate operations involved substantial continuous localized activity within the State of New Jersey. It owns and utilizes substantial properties and facilities in this State (Stipulation of Facts commencing at Ab50a, Paragraphs 11, 14, 15, 16, 17, 18, 19, 21 and 28.) It employs an extensive force of employees on a permanent and continuing basis in this State. (Stipulation of Facts Paragraphs 26, 27, 29 and 34.) It owns, maintains and operates on a permanent basis within the State of New Jersey numerous pick-up and delivery trucks which are licensed by the State and function only in the pick-up and delivery of merchandise between points wholly within the State. (Stipulation of Facts Paragraphs 10, 11, 14, 21, 22, 23 and 25.) It utilizes, systematically and regularly, sales personnel for the purpose of soliciting and handling local accounts and it engages in substantial advertising and promotional campaigns in the State encouraging the use of their respective services. (Stipulation of Facts Items 29 and 35.) Moreover, the appellant pays voluntarily other taxes to the State of New Jersey or its political subdivisions including local property taxes, improvement taxes, license fees and the like. (Stipulation of facts Items 23, 25 and 36.) In their totality this pattern discloses a "bundle of corporate activity . . . so enmeshed in local connections" as to provide a sound basis for taxation. These facts and others formed the basis for the finding of the New Jersey Supreme Court that there were sufficient aspects of local business to subject appellant to the sovereign power of the State.

"Quite apart from the intangible benefits all businesses receive by reason of the very existence of an orderly state government, a couple of specific things come to mind here as examples of particular benefit. The taxpayers' over-the-road vehicles, registered elsewhere and not paying any license fees to New Jersey, in traveling over two and a half million miles in a year on highways here, must have very considerably utilized toll-free roads constructed and maintained by the state as well as country roads built or improved by state aid distributions. The vehicles and their cargoes were protected by the law enforcement activities of the state police force. The use of the courts necessarily also involved utilization of facilities and services provided by state revenues." (50 N. J. at pp. 492-493, Ab24a).

In sum, the application of the New Jersey tax to appellant has been sustained by the New Jersey Supreme Court upon such bases as have already been constitutionally sanctioned by this Court.

POINT II

Appellant has presented no reasons why the Court should give further attention to this matter.

Appellant presents two arguments to support its contention that this matter requires full hearing by this Court. It argues that the action of the New Jersey Supreme Court has forced the conclusion ". . . that *Spector* is dead (Ab13). It also seeks to combine as indistinguishable the privilege or right of doing business with the actual performance of business activity within the taxing state. In the first of its propositions appellant is incorrect in its

reading of the opinion of the New Jersey Supreme Court. In the second, appellant is incorrect in its reading of the opinions of the Supreme Court of the United States.

If evidence is required of the continued viability of *Spector* within its presently delinated sphere, it may be found in the statement of the New Jersey Supreme Court that

> "It remains established that a tax on an exclusively interstate business verbally based solely on the privilege of doing such business in the state is constitutionally forbidden." (50 N. J. at p. 492, Ab23a).

This is the present substance of the holding in *Spector*. If further buttress of this position must be demonstrated it may be found in the New Jersey Court's statement:

> "We therefore construe that basis of New Jersey's tax to be inapplicable to taxpayers like those involved here." (Id. at p. 492, Ab23a).

It is true that the New Jersey Supreme Court indicated its conviction

> ". . . that the minority approach [in *Spector*] has since become the court's general view . . ." (Id. at p. 487, Ab17a).

Appellant apparently has not considered the remainder of the Court's sentence that

> ". . . the later decisions demonstrate the case remains authority . . . in the precise statutory situation there found."

There is a considerable difference between overruling a decision and pointing up a reading by this Court which has restricted that decision to its peculiar statutory facts.

Appellant's second argument confuses the privilege of doing business with the actual performance of business activity.

> "It is impossible to perceive how the privilege of exercising a corporate franchise can mean, in practical effect, anything different from a corporation's doing business. * * * It is equally difficult to perceive how a corporation can own capital or property without its doing business." (Ab9-10).

It is apparent from the foregoing quotation that 17 years of the judicial history of this Court have had no impact upon appellant's thinking. Appellant ignores the language of *Northwestern Cement,* quoting *Wisconsin* v. *J. C. Penney Co.* that where a state has exerted its power in relation to opportunities it has given, protection it has afforded and benefits it has conferred

> ". . . it 'is free to pursue its own fiscal policies, unembarrassed by the Constitution. . . .'" (at p. 465)

Appellant ignores the statement, again in *Northwestern Cement,* that

> ". . . the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the state. *The levies are not privilege taxes based on the right to carry on business in the taxing state.*" (Emphasis added) (at pp. 461, 462).

Appellant ignores the question raised in *Railway Express II* as to

> ". . . whether the tax in practical operation is on property or on privilege." (at p. 435).

Appellant ignores the concept of

> ". . . the bundle of corporate activity . . . enmeshed in local connections . . . ." *Supra,* at p. 447.

In point of fact to give credence to appellant's argument is to expand the doctrine of *Spector* by ignoring history. One is tempted to point to the dialogue in the play "Inherit the Wind" between Henry Drummond and Matthew Harrison Brady:

Brady:

> "Why is it, my old friend, that you have moved so far away from me?"

Drummond:

> "All motion is relative. Perhaps it is *you* who have moved away—by standing still."

Lawrence and Lee, *Inherit The Wind* in Best American Plays Fourth Series at p. 421. (Crown Publishers, Inc. New York 1958).

CONCLUSION

The New Jersey Supreme Court has determined that the New Jersey Corporation Franchise Tax is constitutionally applicable to a foreign corporation doing an interstate business as a levy for the privilege of employing or owning capital or property, or maintaining an office in the taxing State, as well as by reason of its imposition in lieu of all other local taxation of intangible personal property. In so doing the New Jersey Court has followed and subscribed to the developed precedents of the United States Supreme Court. Appellant has raised no substantial or important federal constitutional question which warrants

the further attention of this Court and, therefore, it is respectfully urged that this appeal be dismissed and/or the judgment below be affirmed.

Respectfully submitted,

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